

African National Congress



National Disciplinary Committee (NDC)

OFFICE OF THE CHAIRPERSON: CDE DEREK HANEKOM

**IN THE NATIONAL DISCIPLINARY COMMITTEE (NDC) HELD ON FRIDAY
27 MAY 2016 AT ST GEORGE HOTEL, IRENE, PRETORIA**

Case No. 1/2016

In the matter between:-

MBULELO PAUL GLADSTONE NOTYAWA

Appellant

AND

AFRICAN NATIONAL CONGRESS

Respondent

FINDING

Background

1. On 13 March 2015 the ANC Caucus in the Makana Municipality issued a directive at an ANC caucus meeting that the Appellant, a PR councillor and mayoral committee member, should decline a recommendation of the Makana Municipality that he be appointed as the municipal manager.
2. The Appellant initially agreed in writing to accept the directive of the ANC caucus but subsequently stated publicly that he was coerced to accept the directive and instituted a review application in the High Court for various relief, *inter alia*, that the MEC for Local Government confirms his appointment as municipal manager of the Makana Municipality.

Charges

3. The Appellant was charged with contravening Rules 25.17.4 (bringing the ANC into disrepute), 25.17.11 (undermining the respect for or impeding the functioning of any structure or committee of the ANC), 25.17.16 (prejudicing the integrity or repute of the Organisation), 25.17.19 (breaching his or her contract of deployment concluded with the NEC) and 25.17.20 (in the case of a member of an ANC caucus, failing, refusing or neglecting to carry or execute an instruction or mandate of such caucus).
4. The specific act of misconduct alleged by the ANC was that the Appellant failed, refused or neglected to carry out the instruction of the ANC caucus viz. to decline a recommendation that he be appointed as the municipal manager. The ANC alleged that such conduct contravened Rule 25.17.20 of the ANC Constitution.

Proceedings before the Eastern Cape PDC

5. The PDC commenced the disciplinary hearing on 1 November 2015 and the Appellant was present.
6. He raised a point *in limine* pertaining to the pre-hearing conference and other procedural points and also complained about the manner in which the Chief Provincial Presenter, Advocate Sishuba, was conducting the hearing.
7. After a short adjournment the PDC dismissed the points *in limine* and ordered the continuation of the disciplinary hearing.
8. At that point, the Appellant stated, *"I guess that is the end of the road for me. I cannot continue with this hearing. I am an officer of the Court and I have raised legitimate and legal reasons, justifying my reasons for not continuing with this hearing"*.
9. When asked by the PDC Chairperson whether he was aware that the hearing would continue in his absence, he said he did and walked out.
10. The PDC proceeded with the disciplinary hearing in the absence of the Appellant as it is entitled to do in terms of the ANC Constitution.
11. Comrade Sishuba advanced the following argument in support of the Appellant's conviction:-

"He lied under oath. He committed perjury. He admitted to being instructed by caucus not to accept the appointment as the Municipal Manager. He accepted the instruction and wrote a letter to that effect and then turned around to say he was made to write the letter under duress. I ask that he be found guilty as charged and that the ANC has made its case".

See: P8 of PDC Record

12. The Appellant was found guilty as charged and the Chief Provincial Presenter wrote to the Appellant to inform him of the PDC finding and to invite him to lead evidence in mitigation of sanction.
13. The Appellant ignored this recommendation and failed to appear before the PDC when the sanction was considered.
14. On 30 November 2015 the PDC suspended the Appellant for 5 years.

Appellant's Grounds of Appeal

15. The Appellant advanced the following substantive grounds of appeal:-
 - 15.1 The PDC erred in condoning that a pre-hearing conference was not held two days before the hearing.
 - 15.2 The PDC erred in not finding that the subject matter of the disciplinary hearing was sub judice as review proceedings were pending before the High Court in Grahamstown.
 - 15.3 The PDC hearing was not fair.
 - 15.4 The PDC erred in finding that the ANC has the right to direct a member not to accept the position when this is in direct violation of Rule 25.6.1 of the ANC Constitution.
16. The ANC did not oppose the appeal.

Additional information sought by the NDC

17. In order to obtain greater clarity on the matter, the NDC requested the Deputy Chief National Presenter, comrade Andries Nel, to provide information on the procedure that is followed when appointing a municipal manager in local government. The NDC also requested the

Executive Mayor of Makana Municipality to provide details as to how it came about that the Appellant was recommended for the position of municipal manager.

18. Comrade Nel did not respond but the Executive Mayor of Makana Municipality provided the following information:-

18.1 The position of municipal manager was advertised on 10 November 2014 and the Appellant applied;

18.2 He was subsequently interviewed and shortlisted for the position;

18.3 His appointment was subject to the concurrence of the MEC for Local Government which was not granted;

18.4 The Appellant instituted legal action against the municipality demanding that he be appointed and the matter is pending in the High Court.

Evaluation by the NDC

Appellant's argument that the PDC erred in condoning that a pre-hearing conference was not held two days before the hearing

19. In the view of the NDC, the PDC correctly found that the purpose of a pre-hearing conference was to get an appreciation of the issues and limit, where possible, the issues in dispute. The overall purpose is to expedite the disciplinary proceedings and render swift justice. As such, the purpose of a pre-hearing conference overrides the formal requirement that it be held two days before the hearing.
20. There may be good reason for a pre-hearing conference to be held a day before the disciplinary hearing or even on the morning before the commencement of the disciplinary hearing, provided that the parties agree.
21. In the present case, the Appellant voluntarily agreed to engage with the Chief Provincial Presenter in a pre-hearing conference a day before the commencement of the disciplinary hearing.
22. In the view of the NDC, the Appellant cannot, after being party to this voluntary arrangement, claim that the pre-hearing conference was not held two days before the hearing as stipulated in the Appendix to the

Constitution and therefore seek a postponement of the hearing on that basis.

23. In the circumstances, the PDC correctly condoned non-compliance with the two day requirement.

Appellant's argument that the PDC erred in not finding that the subject matter of the disciplinary hearing was sub judice as review proceedings were pending before the High Court in Grahamstown

24. In the view of the NDC, the subject matter that was being adjudicated in the disciplinary hearing viz. that the Appellant, in the main, was guilty of contravening Rule 25.17.20 of the ANC Constitution, has no connection to the relief sought by the Appellant in the High Court proceedings. Consequently, the PDC was correct in finding that the sub-judice rule did not apply and the Appellant's argument is rejected.

Appellant's argument that the PDC hearing was not fair

25. The Appellant voluntarily left the disciplinary hearing.
26. The ANC Constitution expressly provides that a disciplinary hearing may continue in the absence of the charged member. Moreover, the Appellant confirmed to the PDC Chairperson that he was aware of this provision in the Constitution.
27. The NDC finds that the hearing was fair and in compliance with the ANC Constitution.

Appellant's argument that the PDC erred in finding that the ANC has the right to direct a member not to accept the position when this is in direct violation of Rule 25.6.1 of the ANC Constitution

28. There is no Rule 25.6.1 in the ANC Constitution. However, it appears to the NDC that the Appellant is arguing that the ANC caucus cannot direct him not to accept the position of municipal manager for which he was recommended by the municipality.
29. In terms of Rule 25.17.20 of the ANC Constitution, it is an act of misconduct if a Councillor fails, refuses or neglects to execute an instruction or mandate of the ANC Caucus.
30. Before proceeding to establish whether the Appellant's conduct

constituted a breach of the Rule, the NDC first has to decide whether the Appellant's conduct fell within the ambit of Rule 25.17.20.

31. In the case of **Mbongeni Zondi and others** (case no. 2 of 2014), the NDCA referred to a circular published on the ANC website by the then ANC Chief Whip in the National Parliament, comrade Stone Sizani, in which he articulated the mandate and functioning of caucuses as follows:-

"The members of the ANC Caucus at all levels of their deployment derive their broad mandates from Caucus. At all material times such mandates will be consistent with resolutions of the ANC constitutional structures.

The principal tasks of caucuses of political parties are to keep MPs of each political formation informed about the parliamentary programme and to enable the MPs to discuss and agree on the approach of their parties to all matters on the parliamentary agenda.

Caucuses also serve as the organ within which those elected by caucus to parliamentary positions account to the organisation.

Caucuses also serve as the point of contact between MPs and the leadership of the organisation to which they belong.

Caucuses also manage the work of the study groups. The ANC Caucus carries out the above functions under the supervision of the political committee."

32. In the view of the NDC, it is an established rule that such instruction, directive or mandate of the ANC caucus must be lawful (i.e. it must be within the bounds of the ANC Constitution) and reasonable in order to compel or direct a member to obey it or to penalise him or her for failing, refusing or neglecting to obey it.
33. In the present case, the NDC had to decide whether the directive issued by the ANC caucus in the Makana Municipality (viz. that the Appellant declines a recommendation that he be appointed as the municipal manager) fell within the mandate and functioning of the caucus. In other words, was the directive lawful and reasonable.
34. In the **Zondi** case, the NDCA stated that, *"in addition to the comments of the Chief Whip, ANC Caucuses exist for the purpose of furthering ANC policy and goals through strategies used in various fora (in this case a municipality) to achieve the political objectives of the ANC as set out in its Constitution. In such circumstances, there is very little opportunity for members of a caucus not to obey the caucus decision."*
35. The Appellant's decision to apply for the position of municipal manager

was a personal one.

36. Rule 25 of the ANC Constitution deals with organisational discipline and manages the relationship between the organisation and its members.
37. The ANC is a voluntary political organisation and a structure of the ANC cannot direct a member not to do something which is, in effect, a personal decision.
38. The jurisdiction of the ANC to discipline its members is limited to acts of misconduct set out in Rule 25 and does not extend to personal decisions made by members in respect of their career and job opportunities.
39. The NDC is of the view that the ANC caucus went beyond the limits of organisational discipline in issuing the directive that it did. Furthermore, the decision of the ANC caucus is not one that falls within the ambit of the purpose and functioning of a caucus.
40. The PDC, in its Finding, accepted the principle of voluntariness when it said, *"Any person including a member of the ANC deployed to a municipality may apply to be appointed as Municipal Manager for the same municipality, but he will have to resign as a councillor and assume the position of Municipal Manager. He cannot hold both positions"*.

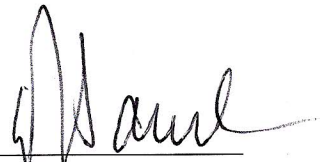
See: paragraph 27.5 of PDC Finding

41. It is axiomatic that the Appellant would have had to resign as a councillor if he was appointed to the position of municipal manager.
42. However, in the view of the NDC, the PDC's reasoning went astray when it took the view that the Appellant could not hold both positions.
43. In the view of the NDC, the Appellant was not obliged to resign as a Councillor before his appointment as municipal manager was finalised. At no stage did the Appellant suggest or contemplate that he would hold both positions.
44. Although the Appellant adopted an aggressive attitude and disrespected the PDC, the NDC has not allowed these issues to cloud its steadfast approach towards procedural and substantive fairness.


NDC Finding

1. The appeal is upheld and the conviction and 5 year suspension imposed by the PDC is reviewed and set aside.

Dated at Irene, Pretoria this 27th day of May 2016



DEREK HANEKOM
CHAIRPERSON
NDC



EDNA MOLEWA
MEMBER
NDC



LINDIWE SISULU
MEMBER
NDC